United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-2067

B
P/S

United States Court of Appeals

For the Second Circuit.

HAROLD SHATZ,
Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,
Respondent-Appellee.

On Appeal from the United States District Court for the Eastern District of New York

BRIEF FOR APPELLANT HAROLD SHATZ

DANIEL J. GOTLIN
Attorney for Appellant Harold Shatz
401 Broadway
New York, N.Y. 10013
(212) 966-5897

DICK BAILEY PRINTERS — TEL. (212) 447-5358

INDEX TO BRIEF

	Page
Question Presented	1
Preliminary Statement	1
Statement of Facts	2
Statutory Provision Involved	4
ARGUMENT - The Knowing Use of Perjured Testimony by the Prosecutor Regarding Promises Made to the Witness, Brugman, Denied the Defendant Shatz a fair Trial and Violated his Rights Under the Constitution	5
Conclusion	9

TABLE OF CASES

	Page
Napue v. Illinois, 360 U.S. 264 (1958)	6
People v. Savvides, 1 N.Y. 2d, 554 (1956)	7
Giglio v. U.S., 405 U.S. 150 (1971)	8

STATUTES

Title 28, United States Code, Section 2255	1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
- - - - - - - - - - - - - - - - - - - X

HAROLD SHATZ,

Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA, Docket No. 75-2067

Respondent-Appellee.

- - - - - - - - - - - - - - - - - - - X

BRIEF FOR APPELLANT HAROLD SHATZ

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether there was a knowing use of perjured testimony concerning promises made by the prosecutor to the governments key witness, Alberto Brugman, thus denying Harold Shatz a fair trial.

PRELIMINARY STATEMENT

On September 3, 1974 a motion was filed by Harold Shatz, pro se, pursuant to 28 U.S.C. Section 2255, to vacate the judgment and sentence of October 18, 1972 under indictment number 72 CR 465.* Shatz was convicted after a trial by jury

---

* The motion to vacate is part of the appendix pp. A-1-A-9.

in the United States District Court for the Eastern District of New York before Judge Jack B. Weinstein of two counts of conspiracy to violate 18 U.S.C. Section 1951 and sentenced to ten years imprisonment.

On March 24, 1975 a hearing was held on the 2255 petition before Judge Weinstein and the motion was denied and the petition dismissed.* This is an appeal from the denial of said motion and the dismissal of the petition. The Court's findings were read into the record. Daniel J. Gotlin was assigned to represent the appellant Shatz in the District Court and has been continued as counsel on appeal by order of this Court, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

The only witness at the hearing on the motion was Alberto Brugman, who appeared and testified on behalf of Harold Shatz. He stated that he was testifying voluntarily and that no promise or threats were made in order to induce him to testify. (H. 6-7)**

Brugman traced the time from his arrest on a

---

* The transcript of the proceeding is included in appellant's Appendix pp. A-27 - A-65

** Numerals in parentheses preceded by "H" refer to pages of the transcript of the proceeding dated March 24, 1975 which has been docketed as part of the record on appeal and is part of the Appendix.

burglary charge in Brooklyn in October, 1971 and explained how he was visited both by Nassau County Police and the F.B.I. and eventually meeting Assistant United States Attorney, Steven Behar, the prosecutor in the criminal charges which were then pending against both Brugman as well as Harold Shatz.

Brugman recounted his meetings with Mr. Behar explaining that he saw him approximately five times. He testified that Mr. Behar told him that if he testified against Shatz he would get a plea with a sentence of five years, which Brugman understood would run concurrently with the five year sentences he was serving in New York State for a number of indictments, and if he did not cooperate he would wind up getting twenty years (H. 11-12).

Brugman went on to testify that Mr. Behar told him how to respond to any questions he was asked by Mr. Shatz's attorney in connection with promises made to Brugman. More specifically when asked at trial by Shatz's attorney "Were any promises made to you by the Federal Attorney's office in consideration of your testifying here" Brugman was told to respond "no" by Mr. Behar. (H. 14-15) This Brugman goes on to say was not the understanding he was actually given by Mr. Behar, whom Brugman claimed led him to understand that the five year sentence he was to receive by the federal courts would run concurrently with

his state sentences, and he, Mr. Behar, was going to take care of it. (H. 17-18)

On cross-examination Brugman again stated that he was not telling the truth at the trial when he responded "no" after having been asked on redirect examination by Mr. Behar if he was ever told that his sentences were going to run concurrently (H. 24-25). Brugman also testified on cross examination at the hearing about how he was going to be allowed to plead to a five year count instead of a twenty year bank extortion count.

After brief redirect examination of Mr. Brugman the Court then dismissed the petition.

STATUTORY PROVISION INVOLVED

28 U.S.C. Section 2215 Federal Custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. . . .

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be

served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the Court finds that the judgment was rendered without jurisdiction or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

* * *

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

* * *

ARGUMENT

THE KNOWING USE OF PERJURED TESTIMONY BY THE PROSECUTOR REGARDING PROMISES MADE TO THE WITNESS, BRUGMAN, DENIED THE DEFENDANT SHATZ A FAIR TRIAL AND VIOLATED HIS RIGHTS UNDER THE CONSTITUTION

Judge Weinstein in denying the motion and dismissing the petition held that even if the testimony at the hearing was construed in the most favorable terms to Harold Shatz it would have made no difference in the

total evaluation of the evidence. However, it must be conceded by the United States Attorney that the trial jury sent at least one note to Judge Weinstein indicating they were hopelessly deadlocked. It also must be conceded that the only witness at the trial to link Shatz to the crimes was Mr. Brugman, without whose testimony it would have been impossible to even indict Shatz.

It has been clearly and conclusively established that where the government knowingly and intentionally uses perjured testimony to obtain a conviction the conviction is invalid. The case of Napue v. Illinois, 360 U.S. 264 unanimously reversed a conviction so obtained.

At Shatz's hearing the only evidence introduced clearly established that the government had made the witness, Brugman, certain promises which Brugman claimed he was told by the government to deny at the trial.

The Napue case, supra, involved a situation where the principal witness testified in response to a question that he had received no promise or consideration in return for his testimony and the state attorney who knew this was false did nothing to correct it.

The situation in the case now before the court is similar in that according to the witness, Alberto Brugman, he was told to answer in the negative by the United States Attorney when asked if any promises were made in order to

induce him to testify. This was clearly not the impression given to Brugman by the prosecutor.

Justice Warren in writing the Napue opinion stated: "First it is clearly established that a conviction obtained through the use of false evidence, known to be such by representatives of the State, must fall under the fourteenth amendment, (citations omitted) the same result obtains when the state, although not soliciting false evidence allows it to go uncorrected when it appears. Oleorta v. Texas, 355 U.S. 28; U.S. ex rel. Almeida v. Baldi, 195 F.2d 815; U.S. ex rel. Montgomery v. Ragen, 86 F. Supp. 382; U.S. ex rel. Thompson v. Dye, 221 F.2d 763. The principle that a State cannot knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence and it is upon such subtle factors that the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."

People v. Savvides, 1 N.Y.2d 554, 557 decided by the New York Court of Appeals held that "it is of no consequence that the falsehood bore upon the witnesses

credibility rather than directly upon defendant's guilt ... That the District Attorney's silence was not the result of quile or a desire to prejudice, matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."

The credibility of the witness Brugman was an essential issue as Shatz's trial, particularly in view of the fact that the only witness at the trial who implicated Shatz with the crimes was Brugman.

Any and all promises made to the witness should have been revealed to the jury. The witnesses credibility was their concern as triers of the facts. The trial court cannot know whether these additional factors would or would not have made a difference in the total evaluation of the evidence, particularly where the only real issue at trial was that witnesses credibility. Certainly the jury should have known all the facts.

In Giglio v. U.S., 405 U.S. 150, the government's case depended almost entirely on the testimony of a co-conspirator, much the same as this matter. The government's failure to disclose an alleged promise of leniency made to the key witness in return for his testimony, although apparently a result of negligence, was held to be a violation of due process.

The evidence at the hearing in the District Court clearly establishes that all promises made to the witness were not revealed. All the cases would seem to indicate that the failure to reveal all promises made to a key witness denies a defendant a fair trial and requires reversal of any conviction so obtained. Such should have been the finding in the case now before the Court.

CONCLUSION

For all the foregoing reasons the Court should vacate and set the judgment aside and discharge the prisoner, or in the alternative grant him a new trial.

Respectfully submitted,

DANIEL J. GOTLIN
Attorney for Appellant
HAROLD SHATZ
401 Broadway
New York, N.Y. 10013
(212) 966-5897

STATE OF NEW YORK)
: SS:
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 7 day of June, 1974 deponent served the within Brief upon US Attorney

attorney(s) for appellee

in this action, at 225 Cadman Plaza E. Brooklyn NY

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this
7 day of June, 1974

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976